Vol 312



IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 649

ALLIED BRIDGE AND CONSTRUCTION CO.,
*Petitioner,*

*vs.*

DANVILLE SANITARY DISTRICT,
*Respondent.*

**PETITION FOR WRIT OF CERTIORARI AND BRIEF.**

CHARLES P. R. MACAULAY,
*Attorney for Petitioner.*

THE BLAKELY-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

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ALLIED BRIDGE AND CONSTRUCTION CO.,
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## PETITION FOR WRIT OF CERTIORARI.

*To the Honorable Charles Evans Hughes, Chief Justice and Associate Justices of the Supreme Court of the United States:*

Your petitioner, the Allied Bridge and Construction Company, incorporated under the laws of Delaware, respectfully represents that it brought suit against the Danville Sanitary District, a municipal corporation in Vermilion County, Illinois, hereinafter called the respondent, for extra work done and material furnished in the construction of an intercepting sewer within the corporate limits of said sanitary district pursuant to a certain contract in writing between the parties (Record 2); that the District Court heard the case without a jury and rendered a judgment of $13,639.16 in favor of your petitioner; that the respondent appealed to the United States Circuit Court of Appeals for the Seventh Circuit, that said Court of Ap-

peals by its opinion construed said contract as requiring the sewer to be constructed as it was in fact constructed and held that the case stated no cause of action for extra compensation (Record 202; Opinion of Court of Appeals 11); that said court, therefore (on August 6, 1940) reversed the judgment of the District Court and remanded the cause with instructions to proceed in accordance with the views expressed in the said opinion (Record 203); that on August 21, 1940 your petitioner duly filed its petition for rehearing (Record 203) and that the Circuit Court of Appeals entered its order denying said petition for rehearing on September 25, 1940 (Record 204).

## Statement of Matter Involved.

The parties entered into a written contract by which the petitioner agreed to construct the intercepting sewer under the supervision of the respondent's engineers in accordance with the plans which were furnished by the respondent and which were made a part of the contract.

The contract was a printed volume consisting of more than 300 pages and it was introduced in evidence as Plaintiff's Exhibit 2 (Record 132). The plans were large sheets bound together consisting of 27 sheets and they were introduced in evidence as Plaintiff's Exhibit 1 (Record 132). These documents, Exhibits 1 and 2 were on the appeal of respondent certified to the Circuit Court of Appeals by order of the District Court (Record 132, 180, 185) and they have been certified to this Court by order of the Circuit Court of Appeals by stipulation of the parties (Record 206).

In order to facilitate examination of the plans, the petitioner is presenting under separate cover photostat copies of sheets No. 21 and No. 22 of the plans, which alone are material on this petition for writ of certiorari.

It is necessary to point out that the sheets of plans introduced in evidence as Plaintiff's Exhibit 1 bear the legend in the lower right-hand corner that the scales are Horizontally

1 inch to 100 feet and Vertically 1 inch to 10 feet. But such legend is to be taken in connection with a notice shown on sheet No. 1 of the plans, which is as follows:

> "Note: These drawings have been reduced to one-half the original scale."

Consequently the true scale of the plan introduced in evidence (and shown under separate cover) is Horizontally 1 inch to 200 feet and Vertically 1 inch to 20 feet. The fine lines shown in the scale at the right of the profiles are 1/20 of an inch apart and the distance between any two of said fine lines, therefore, represents 1 foot.

Both parties construed the contract as requiring the construction of the sewer at levels calculated from United States Geodetic Survey datum. After the contract had been signed and before construction commenced the defendant's engineers discovered that if the sewer were constructed in accordance with the plans, it would be dangerously high where it crossed a creek and a main sewer (Record 152; Opinion page 5). The engineers, therefore, without the consent of the petitioner, decided to cause the sewer to be constructed at a depth of 1.12 feet below the levels shown in the plans. The contract required the sewer to be constructed from a point known as Station 0+00 at a level of 550.5 feet above sea level and to slope upwards therefrom. On the plans the levels at which the sewer was to be constructed above sea level were clearly marked in figures. It was provided in the contract that all work should be done under the supervision of the (defendant's) engineer and his properly authorized agents (Plaintiff's exhibit 2, page 89; "Supervision"). The defendant's engineers, therefore, wilfully and without the knowledge of the plaintiff directed the plaintiff's workmen to construct the sewer, so that it lay 1.12 feet and more below the levels shown by the figures on the plans.

It is evident that if the plaintiff's superintendent had

inquired of defendant's engineers before the contract was signed what datum was used in the plans they would have informed him that the datum was U.S.G.S., because they themselves thought, until after the contract was signed, that the sewer would be satisfactorily constructed, if constructed at the levels shown by the figures on the plans and the engineers of defendant did not discover, until after the contract had become binding, that if the sewer were constructed in accordance with the plans, it would be dangerously high (Record 152).

The length of the sewer was 6200 feet and, if it had been constructed at the levels shown by the figures on the plans, the trench in which the sewer was laid would have had to be protected from underground water for 1,000 or 1,200 feet from station 0+00, and the remainder of the trench would have been above the water (Record 28). As actually constructed, pursuant to the directions given by defendant's engineers, that is to say, at 1.12 feet and more below the levels fixed by the figures on the plans, the entire trench had to be protected from water (Record 28). The expense of constructing the sewer at the lower levels was much greater than what the expense would have been had the sewer been constructed at the elevations prescribed by the figures shown in the plans, and, therefore, the trial court awarded the plaintiff as damages the additional expense incurred by it as the result of its following the directions given by defendant's engineers.

On the plans a free-hand drawing of the profile of the surface of the ground under which the sewer was to be constructed was shown, but at no points along the line of the profile were any figures shown to indicate the height above sea level of the surface. At the right-hand edge of each of the plans a scale consisting of fine lines drawn 20 to the inch was shown and the distance between any two adjacent lines was supposed to indicate 1 foot. But it was expressly provided in the contract that the profile of

the ground was not guaranteed to be absolutely correct and was presented only as an approximation (Plaintiff's exhibit 2, page 89, "Profiles and Topography"). Consequently, not only was the profile of the surface of the ground shown only as an approximation, but it was impracticable, on account of the smallness of the scale, to accurately determine even what was shown as an approximation of the elevation of the ground. At various points along the sewer the plaintiff was required by the contract to construct manholes, the tops of which were to be level with the surface of the ground. The manholes were shown on the plans and also the heights above sea level of the invert at the places where the manholes were to be constructed. The manholes were shown extending upwards to the surface of the ground, but the heights of the manholes were not indicated, evidently because the plan was not intended to show accurately the level of the ground, but was intended to show accurately only the level of the invert where the manholes were to be constructed. (The figures given on the plans at the top or at the bottom of the manholes do not represent the height of the manholes but their horizontal distances from the respective station points to the right as shown on the plans.)

After the written contract had been signed by the parties the engineers for defendant found that the elevation of the ground was actually at least 1.12 feet lower than the elevation purporting to be shown approximately on the plans. But knowledge of this discovery was kept secret from the plaintiff.

Before submitting any bid on the contract the plaintiff made certain tests in order to determine the nature of the soil, that it would have to excavate, down to the levels shown by the figures on the plans at which the sewer was to be constructed and to determine how much of the sewer would have to be constructed in the presence of water (Record 24-30).

In order to make such tests the plaintiff ran levels from the United States Geodetic Survey bench mark displayed at the Post Office in Danville to points close to the line of the projected sewer and drilled down to the levels at which the sewer was to be laid. The ground was covered with ice and snow to a depth of about one foot and the plaintiff did not attempt to ascertain the height of the ground at such points, but he did ascertain that for about 1,000 or 1,200 feet the levels, which were shown by the figures on the plans for the construction of the sewer, would be under water and that the rest of the construction would be above underground water. In making such tests the plaintiff could have noted the height of the coating of ice and snow that covered the ground at the points where the tests were made and he could have chopped away the icy coating and determined the exact height of the ground, but he was not particularly concerned about the exact amount of soil that he would have to excavate before laying the sewer, but only with the expense he would incur in constructing the sewer after reaching the level prescribed by the contract. In fact, in making his bid in accordance with the form prescribed by the contract itself, he made his bid at a specified price of a certain amount *per lineal foot* (Plaintiff's Exhibit 2, page 48; Division B—Intercepting Sewers, Item B-1).

The Court of Appeals held that the judgment of the District Court should be reversed, because the plaintiff ascertained, or could have ascertained, when he made his said tests, that the surface of the ground was in fact 1.12 feet lower than the level shown on the plans as an approximation and that the contract should be construed as requiring the plaintiff to construct the sewer at levels approximately 1.12 feet lower than the levels shown by the figures on the plans.

It is submitted that the Circuit Court of Appeals misconstrued the contract.

## REASONS RELIED ON FOR ALLOWANCE OF WRIT.

Whether, in case of discrepancy, figures shown on the drawings should take precedence over scaled distances and dimensions is a question that apparently has not been settled by the decision of this Court. The Circuit Court of Appeals notes the fact that in the contract it was provided that when figures were shown on the drawings they should take precedence over scaled distances and dimensions (Record 194; Opinion 3, but the court holds in effect that the scaled distances should nevertheless take precedence over figures in the plans. The correct construction of such contracts is of great public importance.

The petitioner, the Allied Bridge and Construction Company respectfully submits that the United States Circuit Court of Appeals for the Seventh Circuit committed error in reversing the judgment of the District Court of the United States for the Eastern District of Illinois and said petitioner, therefore, prays that this Honorable Court grant a writ of certiorari for the review of said judgment of the United States Circuit Court of Appeals for the Seventh Circuit.

CHARLES P. R. MACAULAY,
*Attorney for Allied Bridge and Construction Company, Petitioner.*

## BRIEF.

The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code as amended. The judgment of the Circuit Court of Appeals was entered on August 6, 1940. Petition for Rehearing was filed on August 21, 1940 and was denied on September 25, 1940.

A copy of the opinion of the Circuit Court of Appeals is printed in full on pages 192 to 202 of the record. An opinion of the District Court is printed on pages 160 to 175 of the record.

### Facts.

The facts are stated in the petition.

The questions presented are:

*First,* the proper construction of the contract. The contract provided for the construction of a sewer. Plans were furnished by the respondent and were made a part of the contract. In the plans the elevations of points along the course of the sewer were shown by figures referable to the United States Geodetic Survey datum (or sea level) and above the representation of the sewer was shown an irregular line which was supposed to represent a profile of the surface of the ground, but said line was erroneously drawn on the plans at an elevation (to be ascertained by scaling on the plans) which was greater than the real elevation of the surface of the ground. The contract provided that the profile of the surface of the ground was shown only as an approximation (Exhibit 2, page 89) and that figures should prevail over scaled distances in case of any discrepancy (Exhibit 2, page 89). In such case, (a) should the contract be construed as requiring the sewer to be constructed at the elevations prescribed by the figures shown along the course of the representation of the sewer on the plans, or (b) should the contract be construed as

requiring the sewer to be constructed at lower elevations, so that the depth of the sewer below the real surface of the ground might be equal to the verticle distances, (to be ascertained by scaling on the plans), from the representation of the sewer to the erroneously drawn irregular line intended by the draftsman to represent the profile of the surface of the ground.

*Second,* If the contract provides that the work is to be done by the contractor under the supervision of the engineer of the owner, or his representatives, and the engineer, after the signing of the contract and before any work is done, discovers that if the sewer is constructed at the elevations prescribed by the figures shown on the plans along the course of the sewer, the sewer will be dangerously high, and if the engineer, therefore, without the knowledge of the contractor, directs the workmen of the contractor to construct the sewer at lower elevations than are prescribed by the figures in the plans and thus causes the contractor to incur greater expense than he would have incurred had the sewer been constructed at the elevations prescribed by the figures, is the contractor entitled to recover damages from the owner?

The Court construed the contract as requiring the sewer to be constructed at the depth below the surface of the ground which was indicated by the profile of the ground shown on the plans; and held that the sewer was constructed as provided for in the contract and that the petitioner, therefore, had no case for any damages.

## ARGUMENT.

It was expressly provided in the contract that:

> "Where figures are shown on the drawings they shall take precedence over scaled distances and dimensions."

Plaintiff's Exhibit 2, page 89, last paragraph.

The purpose of this contract was not to have excavated a certain number of cubic yards of soil, but to construct a sewer at levels agreed upon in writing by the parties and specified by figures on the plans. The figures prescribing the elevation of the sewer invert did not express the elevation merely in feet, nor even in tenths of a foot, but in hundredths of a foot. The depth of the sewer below the surface of the ground was not important. The sewer was designed to carry off sewage and how much soil was to be above it after its completion could have no effect whatever upon the flow of fluids through it. Excavating had, of course, to be done in order to reach the level at which the sewer was to be laid, but the expense of excavating a foot or two more or less of soil was inconsequential. Whatever soil there was above the level of the sewer had to be excavated of necessity in order to construct the sewer.

If the sense of the contract was that the sewer should be laid at such depths below the surface as were indicated by the drawing of the profile of the surface, then since the profile was only an approximation, it would follow that the figures showing the level of the sewer would also have to be regarded as mere approximations. If there was any error in the profile of the surface, then the sewer would have to be constructed in accordance with such error, so that if it developed that at any point there was a rise or depression in the ground that was not shown by the profile, the sewer would have to be constructed with a similar rise or depression. The sewer could not possibly be constructed in accordance with the

contract, so as to carry off sewage, unless the profile of the surface was accurately shown on the plans and also the depths below the surface down to the level of the sewer. The expense of making an accurate profile of the surface of the ground would necessarily have been very great on account of the irregularities of the surface and such a method of specifying the manner in which the sewer should be constructed would be wholly impracticable. To specify the level of the sewer by agreeing upon the height above sea level was the usual and only practical method of contracting for its construction.

The plaintiff had to presume that the defendant wanted to have the sewer constructed at the levels prescribed by the figures in the plan. The plaintiff had no authority to decide that it would be better to construct the sewer at a lower level or that the defendant needed any advice.

How much profit the plaintiff expected to make by performing the contract, or whether the plaintiff expected to make any profit, is immaterial. Even if the plaintiff's agent made no tests in order to ascertain what the underground conditions were, nevertheless, the defendant would be liable to the plaintiff if, as a result of wilfully giving false directions, it contrived to get a better sewer than was bargained for by the contract and caused the defendant to spend for the construction of the sewer more than would have been necessary if the sewer had been constructed in accordance with the contract. The defendant had no right to give directions to the plaintiff or to the workmen with a view to having the sewer constructed otherwise than in accordance with the contract and the defendant is liable to the plaintiff for any damage incurred as a result of following the false directions given by the defendant.

A case very closely in point is *City of Wheeling* v. *Casey*, 74 F. (2) 794 (C. C. A. 4). That was an action in assumpsit based on a contract between the Casey Company and the City for the construction of a purification or filtration plant. The plans and specifications were drawn by an engineering firm employed by the City. An agent and the designated resident engineer of the engineering firm, in

laying out the base of the main line of the whole project mistakenly located said line 21.9 feet to the west of where the same should have been located if laid out in exact accordance with the plans and specifications. The result of this mistake was to shift the entire project as a unit 21.9 feet to the west, every item or unit of said project running in the same relative position to each other unit or item of said project as though constructed exactly on the location called for by said plans and specifications. The mistake was not discovered by the resident engineer until some two months after the work had been started. The Casey Company did not discover the mistake until thirteen months after, when the work of the entire project was 98% completed. The engineers never advised the Casey Company that the mistake had been made and neither did the City so advise the Company. The Casey Company claimed it had incurred additional expense in constructing the project on the mistaken location instead of on the location as shown on the original plans and specifications. Trial was had by a Jury and judgment was entered in favor of the Casey Company in the sum of $35,000.00. The Court held that an action was properly brought in assumpsit and said on page 797:

> "The Casey Company, under the circumstances established by the evidence, is entitled to recover under the terms of the contract both express and implied. Discovery of the change of location by the engineers in June, 1923, the probable imparting of this knowledge to the city late in 1923 or early in 1924, and the failure of either the engineer or the city to notify the Casey Company until the work was practically completed certainly constitutes a breach of the implied covenants of the contract. *Bates & Rogers Construction Co.* v. *Board of Commissioners,* (D. C.) 274 F. 659; Page, Contracts, vol. 5, Par. 2577.
>
> The reason given by the officials of the engineers for not notifying the Casey Company when the mistake was first discovered was that they thought it did not make any difference. Even if it made no difference to the Casey Company it, as well as the city, certainly was entitled to the knowledge acquired by the engineers immediately upon the discovery of the mistake. The jury has, however, resolved the question of

fact as to whether the mistake did damage the Casey Company, in favor of the Casey Company. In view of these circumstances the company is also entitled to recover under the express provisions of the contract for the reason that when the engineers discovered the mistake they certainly exercised an option in not giving the Casey Company the information to which it was entitled. The contract gave the engineers the option of changing the location; they found that by inadvertence they had changed the location and by their silence chose to ratify the change. The city was bound by their action. The pleadings in the case are broad enough to cover these principles as laid down."

It is respectfully submitted that the Court of Appeals is in error in giving undue weight to the circumstance that the plaintiff had the means to ascertain the true ground level and in finding that the plaintiff did in fact ascertain, independently of the plans, that the level of the ground varied more than a foot from the profile data shown on the plans (Opinion 10-11). The plaintiff did not make any test at station 0+00 (Record 32-34) and the profile data shown on the plans could not be computed from the plans except by scaling. Though there was a sort of scale shown on the side of the plan, it was so small that no one could with confidence detect a small variance of a foot and a fraction by scaling on the plan and the exact height of the surface of the ground was not material to the rights of the defendant under the contract, since the figures on the plan fixed the level of the sewer at a certain height above sea level and not at a certain depth below the surface of the ground. Moreover, the contract warned the plaintiff that the surface profile was shown only approximately (Pltf's Ex. 2, page 89); its agent did not in fact ascertain the true height of the surface, nor did he in fact notice that there was any variance. Even if he did ascertain that there was a variance, it was immaterial to the defendant, since all that the defendant was entitled to was to have a sewer

properly constructed at the height above sea level that was prescribed by the figures shown on the plans.

The Circuit Court of Appeals mentions in the opinion that the contract provides that, "In case of discrepancy in the figures or drawings, the matter shall be immediately submitted to the City Engineer without whose decision said discrepancy shall not be adjusted by the Contractor, save only at his own risk and expense" (Record 194; Opinion 3). Any discrepancy as to the height of the surface of the ground could not affect the height above sea level at which the sewer had to be constructed, nor the height of underground water. Even if a discrepancy of this kind were discovered, there would be nothing for the engineer to adjust. It could only affect the amount of soil that would have to be excavated by the plaintiff. Moreover, the respondent's engineers made a resurvey before work was commenced and discovered that the profile of the surface of the ground had been erroneously shown on the plans. Consequently, if the petitioner did discover that there was an error in the plans and reported it to the engineers of respondent, he would have been told by the engineers that they were aware of such fact.

The defendant is to be held to have warranted that the figures on the plans were accurate.

*United States* v. *Spearin,* 248 U. S. 132.

The intercepting sewer constructed by the petitioner was connected with an old sewer. The elevation of the old sewer was 1.46 feet less than the elevation prescribed for the beginning of the intercepting sewer at station 0+00 (Record 84). The Circuit Court of Appeals says in its opinion (Record 202; Opinion 11):

> "Our thought in the matter is that laying the sewer at the invert level of the old sewer structure, constituted substantial compliance with the contract."

It is submitted that the circumstance mentioned by the court should not have led to the conclusion that there was substantial compliance with the contract. The contract did not provide that the elevations of the intercepting sewer should be changed on account of the elevation of the old sewer.

It is submitted that the Circuit Court of Appeals committed error in reversing the judgment of the District Court and the petitioner prays that the writ of certiorari be granted as prayed in the foregoing petition.

Respectfully submitted,

CHARLES P. R. MACAULAY,
*Attorney for Petitioner.*

IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 649

ALLIED BRIDGE AND CONSTRUCTION CO.,
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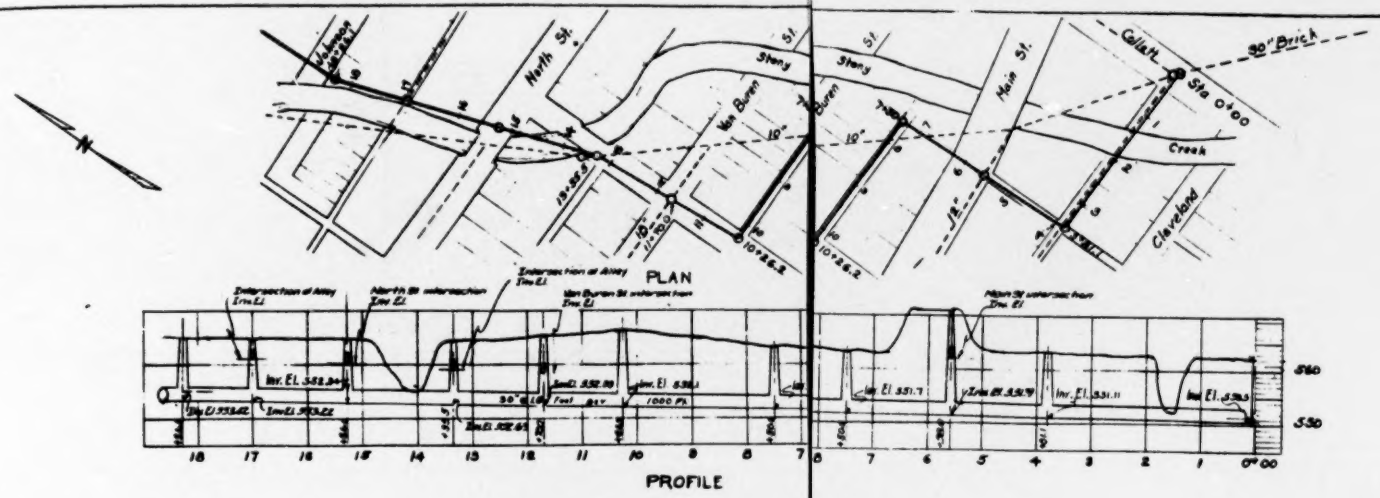
*vs.*

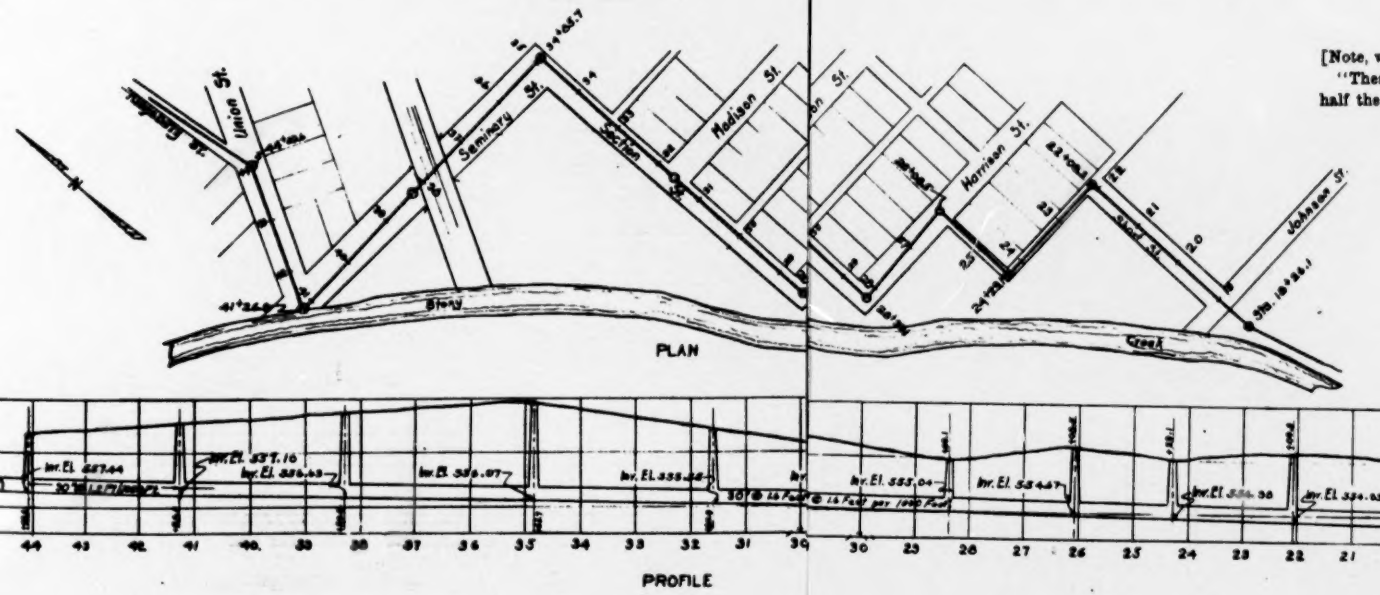
DANVILLE SANITARY DISTRICT,
*Respondent.*

**COPY OF MATERIAL PARTS OF PLAINTIFF'S EXHIBIT 1.**

CHARLES P. R. MACAULAY,
*Attorney for Petitioner.*

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO



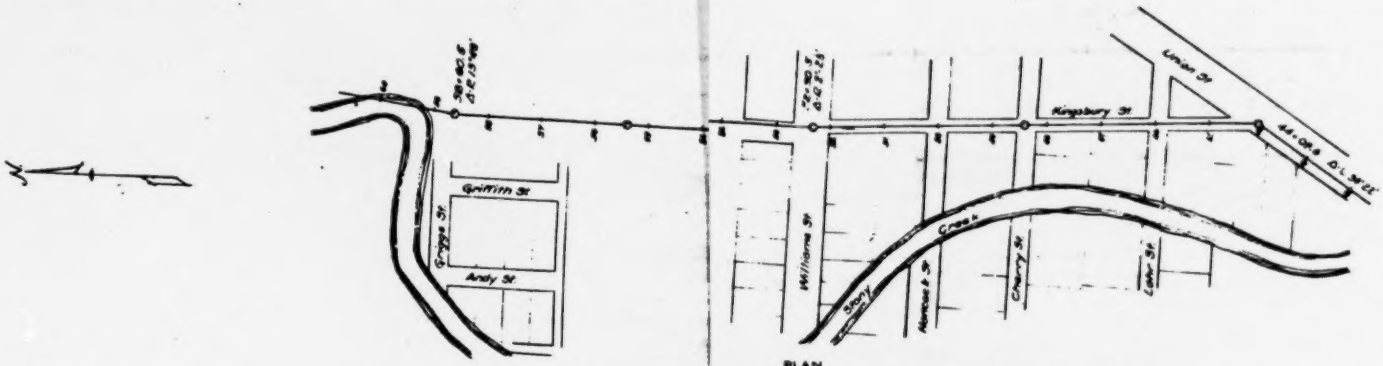



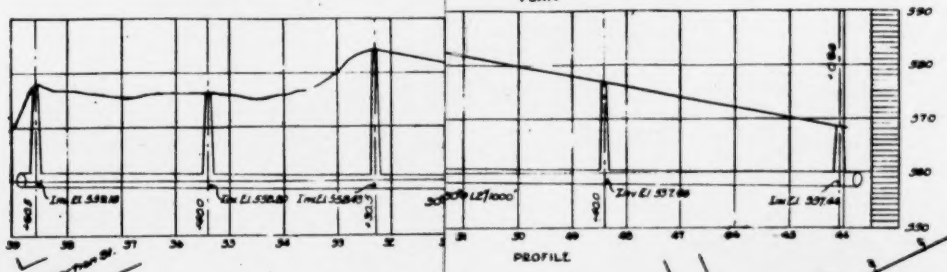

[Note, which appears on Sheet 1 of drawings: "These drawings have been reduced to one-half the original scale."]

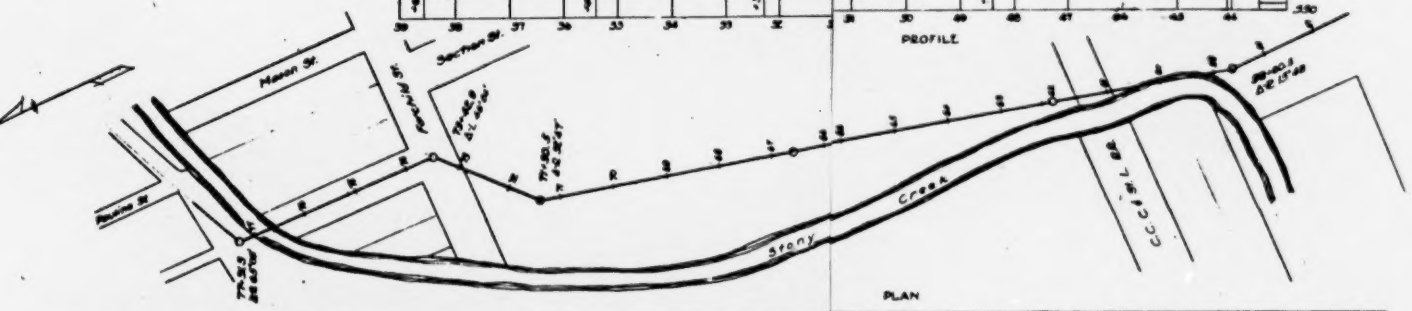
GREELEY & HANSEN
ENGINEERS
CHICAGO, ILL.

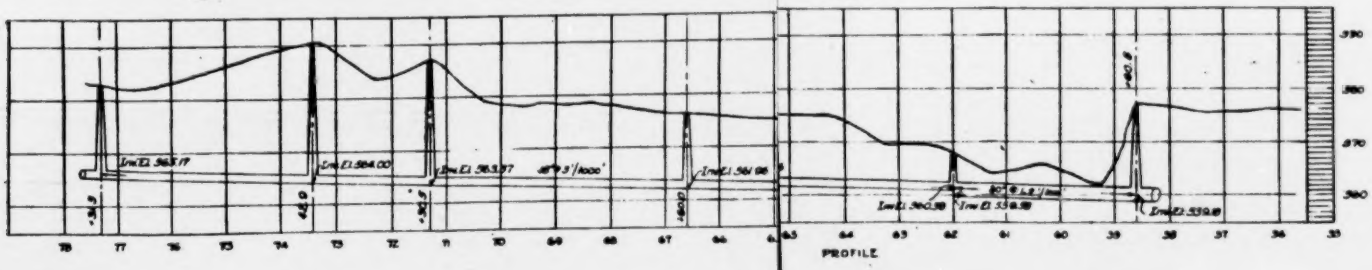
DANVILLE ILL.
INTERCEPTING SEWERS
PLAN & PROFILE
STA. 0+00 TO STA. 44+09.6
SCALES HOR. 1"=100'
VER. 1"=10
NOV. 1933

27 SHEETS
NO. 21

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DANVILLE ILL.
INTERCEPTING SEWERS
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STA. 44+09.6 TO STA. 77+31.3
SCALES HOR. 1"=100'
VER. 1"=10'
OCT. 1954
27 SHEETS
NO. 22

GHEELEY & HANSEN
CIVIL AND SANITARY ENGINEERS
6 NORTH MICHIGAN AVENUE
CHICAGO ILL.